Finally, the Commission must repudiate the quasi-regulatory separate affiliate conditions that it has imposed (in approving recent mergers) on two providers of high-speed Internet service,[63] and that it has hinted that it may extend to others through the 271 process.[64] The Commission has justified the conditions on the ground that incumbent LECs have the "incentive and ability" to discriminate against competing providers of advanced services.[65] But if robust competition in the market does not require the establishment of separate affiliates by *cable*, the dominant provider of high-speed Internet services,[66] it surely cannot require such separation by *ILECs*, the nondominant competitors.

3. Intermediate Title I Regulation: Comparably Efficient Interconnection to Both Coax and Copper.

While the existing regulatory regime is untenable, the Commission may nevertheless be unprepared to adopt a fully deregulatory Title I model for the provision of high-speed Internet service, for fear that it would limit growth among independent ISPs – *i.e.*, ISPs that are not affiliated with broadband transmission providers.[67] In that case, the Commission may seek a regulatory framework that would facilitate the development of the independent ISP industry, while allowing transmission providers to retain control over the management and deployment of their high-speed networks.

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[63] *See SBC/Ameritech Order*, 14 FCC Rcd at 14859, ¶ 363; *Bell Atlantic/GTE Order* ¶ 260.

[64] *See New York Order*, 15 FCC Rcd at 4122-23, ¶ 331.

[65] *See SBC/Ameritech Order*, 14 FCC Rcd at 14795-96, ¶ 187; *Bell Atlantic/GTE Order* ¶ 181.

[66] *See, e.g., AT&T/MediaOne Order*, 15 FCC Rcd at 9866-73, ¶¶ 116-127 (declining to impose conditions related to potential competitive harm in broadband access).

[67] *See id.* at 9866, ¶ 116 (noting that the ability of consumers to choose among a number of viable, alternative ISPs is relevant to its public interest analysis).

The Commission has already developed a model for doing exactly that. In its pre-1996 *Computer Inquiries*, the Commission sought to facilitate the development of the "enhanced services" market (which Congress has since renamed the "information services" market).[68] The Commission accomplished this by requiring the largest telephone companies to "virtually unbundle" a "basic" transmission service from any "enhanced" service offering, and to offer that basic service to other "enhanced service" providers pursuant to a "comparably efficient interconnection" (CEI) or "open network architecture" (ONA) plan approved by the Commission.[69]

The Commission has ample authority to impose a similar regime – uniformly, and across the board – on all major providers of high-speed Internet service. The *Computer Inquiries* rules themselves are self-evidently inapplicable, of course, for they are squarely grounded on the premise that the largest telephone companies control an *exclusive* "bottleneck" in the relevant transmission facility,[70] a premise that is absent in the

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[68] *See generally Non-Accounting Safeguards Order*, 11 FCC Rcd at 21968-72, ¶¶ 128-137 (noting that the *Computer Inquiries*' "basic"/"enhanced" service dichotomy was precursor the Act's "telecommunications service"/"information service" split, and discussing application of *Computer II*, *Computer III*, and *ONA* requirements on BOC provision of intraLATA information services).

[69] *See, e.g.*, Memorandum Opinion and Order, *Petition for Declaratory Ruling That AT&T's Interspan Frame Relay Service is a Basic Service*, 10 FCC Rcd 13717, 13719, ¶¶ 13-14 (1995) (*Computer II* and *Computer III* together require that carriers that own "transmission facilities and provide enhanced services must unbundle" the transmission path and provide it to other enhanced service providers "under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."); Report and Order, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services*, 14 FCC Rcd 4289, 4297-99, ¶ 13 (1999) ("*Computer III Further Remand Order*") (describing the parameters of CEI plans).

[70] *See Computer II Final Decision*, 77 F.C.C.2d at 468, ¶¶ 219-220 ("The importance of the control of local facilities . . . cannot be overstate[d]. . . . [O]ur regulatory concerns [are] directed at monopoly telephone companies exercising significant market power on a broad geographic basis."); *BOC Separation Order*, 95 F.C.C.2d at 1119-20, ¶ 2, 1128, ¶ 23 (*Computer II* structural separation was justified by Bell company's "control of bottleneck facilities"); *id.* at 1132, ¶ 38 (BOCs are in control of the "basic transmission network"); *Computer III*, 104 F.C.C.2d at 1060, ¶ 203 (to ensure that competition prevailed in the provision of enhanced services, "'all would-be providers'" of such services should be guaranteed "'relatively equal costs of interconnection to the bottleneck'") (quoting DOJ comments); *id.* at 1057, ¶ 195 (noting that "ISDN system architecture" would require a policy of comparably efficient interconnection "to sustain effective competition" only if the architecture has "'bottleneck' characteristics"); *see also* Memorandum

broadband context. But if the Commission believes that a *Computer Inquiries*-like framework is necessary to facilitate competition among independent ISPs, it may, in the exercise of its Title I authority, resurrect that framework and apply it to the leading self-providers of transport in the high-speed Internet market.[71]

If the Commission opts to settle for this sort of "virtual unbundling" of broadband, however, it must settle there for everyone. The incumbent LECs' *actual* unbundling requirements, and all the attendant Title II-based obligations discussed above, would have to be replaced with this new Title I framework. Again, there can be no basis for subjecting the nondominant provider of broadband access to an open access regime that is more intrusive than that imposed upon the dominant provider.

B. IF TITLE II IS TO GOVERN THE UNDERLYING TRANSMISSION PATH, IT MUST DO SO EQUALLY FOR DSL AND FOR CABLE MODEM SERVICE.

At the end of the day, the Commission may have less faith in the marketplace than in its own ability to shape and manage competition. The Commission may accordingly opt to distinguish between the information services portion of broadband Internet service

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Opinion and Order on Reconsideration, *Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, 4579, ¶ 38 (1995) ("the need for CEI requirements in connection with the streamlined service is obviated by the existence of substantial competition for that service").

[71] *See Computer and Communications Indus. Ass'n*, 693 F.2d at 214-18 (upholding FCC Title I authority to preempt state regulation over CPE); Further Notice of Proposed Rulemaking, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 13 FCC Rcd 21531, 21547, ¶ 30 (noting Commission authority under Title I to regulate facilities used for both interstate and intrastate communications). There is no doubting the technical feasibility of this approach. *See, e.g.*, Declaration of Albert Parisian, Petition of GTE Serv. Corp., et al., *Application for Transfer of Control of Licenses of MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251 (FCC filed Aug. 23, 1999) (documenting success of GTE's efforts to provide unaffiliated ISPs with access to cable modem customers); Report to the Subcomm. on Antitrust, Business Rights and Competition, Committee on the Judiciary, U.S. Senate, *Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers*, at 60 (GAO Oct. 2000) (noting that "no technical impediments had been found in the [Canadian] technical trial to allow third-party ISP interconnection to the cable modem platform").

and the underlying broadband transmission path, deregulating the former under Title I, while continuing to impose Title II regulation on the latter.

That is a decidedly second-best, but still defensible, option. It is defensible, however, only if the Commission uses its Title II authority to establish regulatory parity between ILECs, the nondominant providers of high-speed Internet services, and cable, the dominant provider. In other words, the same open access requirements that currently apply to ILEC DSL operations must be extended to cable operators offering cable modem service. That cable operators currently elect to bundle their information service with the underlying transmission path cannot be dispositive – no more (or less) so than such an election is dispositive if made by a phone company. As the Ninth Circuit recently made clear, cable is quite as able as any phone company to wear two regulatory hats simultaneously: "[t]o the extent [the cable Internet service provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [it] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act."[72]

1. The Commission Has Statutory Authority to Impose Title II Regulations on Cable Modem Providers.

If the Commission decides to take the two hats/two Titles approach, then it must classify broadband transmission, by whatever technology, as a "telecommunications service." As the Commission has already explained, the cable modem platform is simply

[72] *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000); *see also Cox to Cease Paying Franchise Fees for Cable Modem Service*, Communications Daily (Nov. 21, 2000) (noting Cox's position that under *City of Portland* cable-delivered Internet service, unlike other services delivered over a cable system, is not a cable service and therefore not subject to local franchise fees).

one type of content-free "advanced service."[73] And "advanced services" are themselves "telecommunications services."[74]

The Commission's recent *Advanced Services Order on Remand* concluded that high-speed Internet service provided over DSL can be both "telephone exchange service" and "exchange access" (both of which are "telecommunications services"[75]). It is telephone exchange service insofar as it "permit[s] 'intercommunication' within the equivalent of a local exchange area," and is "covered by 'the exchange service charge'" (which requires only that the service be covered by a "service and payment agreement").[76] And it is "exchange access" insofar as it "facilitates the delivery" of an information service that includes as an underlying component the "telephone toll service used to transport the ISP's Internet access service."[77]

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[73] *E.g.*, *Second Advanced Services Report* ¶ 29 ("Cable companies offer advanced services, most notably high-speed Internet access services, using cable modem technologies."); *see also Federal-State Joint Conference on Advanced Telecommunications Services*, 14 FCC Rcd 17622, 17622, ¶ 1 & n.2 (1999) ("We use the terms 'advanced telecommunications services' and 'advanced services' to mean 'high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.'"); *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24014, ¶ 3 ("advanced services" are "wireline, broadband telecommunications services, such as services that rely on digital subscriber line technology . . . and packet-switched technology").

[74] *E.g.*, *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24029, ¶ 35 ("We conclude that advanced services are telecommunications services."); *Collocation Order*, 14 FCC Rcd at 4770, ¶ 18 ("the actions we take today pursuant to the Act apply to all telecommunications services, whether traditional voice services or advanced services"); Second Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 8694, 8696, ¶ 3 (1999) ("we will consider . . . how the unbundling obligations of the Act can best facilitate the rapid and efficient deployment of *all* telecommunications services, including advanced services").

[75] *See* 47 U.S.C. § 153(16), (47); *see, e.g.*, *Local Competition Order*, 11 FCC Rcd at 15679, ¶ 356; *UNE Remand Order*, 15 FCC Rcd at 3911-12, ¶ 484; *Advanced Services Order on Remand*, 15 FCC Rcd at 391-92, ¶ 16.

[76] *Advanced Services Order on Remand*, 15 FCC Rcd at 395-96, ¶ 23, 398, ¶ 27; *see* 47 U.S.C. § 153(47)(A); *see also id.* § 153(47)(B) ("telephone exchange service" includes "comparable service provided through a system of . . . facilities . . . by which a subscriber can originate and terminate a telecommunications service").

[77] *See Advanced Services Order on Remand*, 15 FCC Rcd at 402-03, ¶ 37.

By exactly the same legal logic, a cable-based self-provider of high-speed Internet access service is likewise engaged in the provision of "telephone exchange service" and "exchange access." Both services are doing *precisely* the same thing – providing (implicitly, under the two-hat theory) a high-speed packet-switched service to end users. The *only* difference is that one is on hybrid fiber-coax, the other on copper (or, increasingly, hybrid fiber-copper). But the Commission itself has squarely held that the "plain language of the statute . . . refutes any attempt to tie [the telephone exchange service or exchange access] statutory definitions to any particular technology."[78]

The Commission, Congress, and the courts have long recognized that cable operators are common carriers to the extent they provide telecommunications services. The Commission extended common-carrier regulation to cable operators as early as 1962 – and did so, tellingly, in a case involving *self-provision* of carriage by a cable operator to "itself or an entity closely affiliated with itself."[79] In 1985, the Commission sized up a cable operator's "institutional" high-speed digital transmission services against Title II definitions, concluding that they fell outside only because they had not been offered to

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[78] *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24032, ¶ 41 ("Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service."); *see also Advanced Services Order on Remand*, 15 FCC Rcd at 395, ¶ 21 ("'telephone exchange service' encompasses voice and data services").

[79] *See* Initial Decision, *Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 468, 483 (1961). In the Initial Decision, which was adopted by the FCC except as to the public interest determination, *see* Decision, *Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 460, ¶ 2 (1962), *aff'd*, *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 361 (D.C. Cir. 1963), the Hearing Examiner explained: "[T]he status of a communications common carrier initially obtains as a result of the bona fide offer of an entity to serve the public upon reasonable request, and without discrimination, pursuant to legally applicable tariffs. That the purported carrier initially proposes to serve, in addition to other members of the public, itself or an entity closely affiliated with itself, has been regarded by the Commission and its predecessor agencies as immaterial at the time of commencement of service. Common carriage is not lacking merely because a considerable portion of a company's business consists of communications service carried for itself or for the industry with which it is associated." Initial Decision, 32 F.C.C. at 483.

the general public.[80] And the Commission has recognized that cable operators operate as common carriers when they provide competitive access services,[81] wireless telephone services,[82] and long-distance phone services.[83] For its part, Congress in the 1984 Cable Act expressly provided that the Commission or a state could require the filing of informational tariffs for non-cable communications services provided over a cable system.[84] The 1996 Congress similarly understood that cable operators can and do provide telecommunications services over their networks.[85] The courts, too, have reached a similar conclusion.[86]

The Commission's authority to impose ILEC-like open access regulation on cable follows ineluctably from the classification of cable modem service as a

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[80] *See Cox Cable*, 102 F.C.C.2d at 120-21, ¶ 24.

[81] Memorandum Opinion and Order, *Application of Teleport Communications-New York for Transfer of Control of Stations WLU372, WLW316 and WLW317 from Merrill Lynch Group, Inc. to Cox Teleport, Inc.*, 7 FCC Rcd 5986, 5988, ¶¶ 16-18 (1992) ("*Teleport Order*").

[82] *See* Tentative Decision and Memorandum Opinion and Order, *Amendment of the Commission's Rules To Establish New Personal Communications Services*, 7 FCC Rcd 7794, 7799-802, ¶¶ 12-18 (1992) (tentatively granting PCS license to Cox Cable for use in connection with its cable plant).

[83] *Teleport Order*, 7 FCC Rcd at 5988, ¶ 16 (citing Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice Of Inquiry, *Telephone Company Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 300, 322-23, ¶ 46 (1991)).

[84] *See* 47 U.S.C. § 541(d)(1); *see also* H.R. Rep. No. 98-934, at 27, 29 (noting the "two-way capacities of cable systems to provide communications services," and explaining that the purpose of what is now section 541(d)(1) was to "preserve[] the regulatory and jurisdictional status quo with respect to non-cable communications services"); *id.* at 41-42 ("[The] legislation does not affect existing regulatory authority over the use of a cable system to provide non-cable communications services, such as private line data transmission or voice communication, that compete with services provided by telephone companies.").

[85] *See* 47 U.S.C. § 541(b)(3) (exempting a cable operator's provision of telecommunications services from Title VI and franchise requirements); *id.* § 224(d)(3) (authorizing the FCC to establish rates for pole attachments "used by a cable system . . . to provide any telecommunications service"); *see also* Joint Explanatory Statement at 169 ("The amendment [to the definition of cable service] is not intended to affect Federal or State regulation of *telecommunications service offered through cable system facilities.*") (emphasis added).

[86] *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979) ("A cable system may operate as a common carrier with respect to a portion of its service only."); *NARUC II*, 533 F.2d at 609 (two-way, point-to-point, non-video communication transmitted over cable channels involves "common carrier activity," regardless of usual status of entity providing the service).

telecommunications service provided by a common carrier.[87] Under section 251(a), for example, the Commission has broad authority "to require interconnection," "even in the ISP self-provisioning context," in accordance with standards established by the Commission pursuant to section 256.[88] Section 201(a) likewise authorizes the imposition of interconnection obligations.[89] Indeed, the Commission has long recognized that "the language of Section 201 of the Act is general," and that the relevant question is simply whether a carrier's refusal to permit interconnection "restrict[s] [its] customers' freedom of choice by limiting the means through which they can satisfy their communications needs."[90] By refusing to interconnect with ISPs, cable operators "unduly hamper[] the free exercise of customer choice," and therefore run afoul of section 201(a).[91]

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[87] *See* 47 U.S.C. § 153(44) ("The term 'telecommunications carrier' means any provider of telecommunications services . . . ."); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 922 (D.C. Cir. 1999) (upholding FCC's interpretation of "telecommunications carrier" to mean "'essentially' the same thing as 'common carrier'").

[88] *Advanced Services Order on Remand*, 15 FCC Rcd at 403, ¶ 38; *see also Local Competition Order*, 11 FCC Rcd at 15990, ¶ 995 ("if a company provides both telecommunications and information services, it . . . is subject to the obligations under section 251(a)"). Section 256 directs the Commission to "promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service" and to "ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks." 47 U.S.C. § 256(a); *cf.* Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1435-36, ¶¶ 56, 57 (1994) (the term "interconnection with the public switched network" extends to interconnection through a data circuit).

[89] *See* 47 U.S.C. § 201(a), (b) (every "common carrier" engaged in "interstate or foreign communication" must provide such communications "upon reasonable request therefor" and on terms that are "just and reasonable"); *GTE ADSL Tariff Order*, 13 FCC Rcd at 22466, ¶ 1 (GTE's ADSL service, "which permits [ISPs] to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level"); *Advanced Services Order on Remand*, 15 FCC Rcd at 403, ¶ 38 (noting Commission's "authority to require interconnection" to ISPs under "section[] 201(a)"); *cf. AT&T Corp.*, 525 U.S. at 377-78 (Commission's authority under section 201(b) is co-extensive with the Communications Act).

[90] Memorandum Opinion and Order, *Restrictions on Interconnection of Private Line Services*, 60 F.C.C.2d 939, 943-44, ¶ 13 (1976) ("*Private Line Services Order*"); *see also Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975); *Bell Tel. Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974); 47 U.S.C. § 251(i) ("[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201").

[91] *Private Line Services Order*, 60 F.C.C.2d at 943, ¶ 13.

The Commission also has statutory authority to classify cable operators as "comparable" to an incumbent LEC and therefore subject them directly to the obligations of section 251(c).[92] As an initial matter, cable operators – no less than telephone companies – may be treated as "local exchange carriers" when they provide Internet access over self-provided transmission.[93] And, as the Commission has explained, a local exchange carrier will be deemed "comparable" to an ILEC where it "occup[ies] a dominant position in the market for telephone exchange service in [its] operating area[], and possess[es] economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of section 251(c)."[94] Cable operators are unquestionably dominant in the broadband market – which, as the Commission has found, is a local exchange market – and if the regulatory burdens imposed on the nondominant ILECs are necessary to facilitate competitive entry, it must be the case that they are necessary for cable operators as well.

2. Implementation of the Title II Model for Cable Modem Providers.

If the Commission takes the Title II option for underlying broadband transport, it must establish regulations governing cable modem service comparable to those that apply to ILECs offering DSL. The rationale for both sets of regulations is the same, and policy

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[92] *See* 47 U.S.C. § 251(h)(2); *In re Guam Pub. Utils. Comm'n*, 12 FCC Rcd 6925 (1997) ("*Guam PUC*").

[93] *See Advanced Services Order on Remand*, 15 FCC Rcd at 394, ¶ 20, 401-02, ¶ 35; *supra* pp. 27-28; 47 U.S.C. § 153(26) ("The term 'local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access.").

[94] *Guam PUC*, 12 FCC Rcd at 6941, ¶ 26; *see also id.* at 6944-45, ¶ 33 (noting importance of a carrier's "substantial financial resources, significant economies of density, connectivity, and scale, and, most importantly, control of the bottleneck local exchange network").

considerations demand parity in the provision of what is, despite variances in technology, the same service.

Spectrum Unbundling. If protecting competition in the market for high-speed Internet services requires "spectrum unbundling" in nondominant copper, it assuredly requires spectrum unbundling in dominant coax, too. The Commission has already concluded it has the discretion to impose spectrum unbundling on ILECs; if so, it clearly has the authority to impose spectrum unbundling on cable, along with such ancillary regulatory burdens as "loop conditioning" (in its cable equivalent) and the compliance-monitoring and reporting procedures that will permit the Commission to monitor cable's ultimate compliance with the spectrum unbundling mandate.

Cable spectrum is already "unbundled" in some degree, of course – cable operators are required to set aside video channels for use by various third parties.[95] In terms of spectrum required, a cable modem service requires two channels: one channel for downstream traffic and another channel for upstream signals, each consisting of approximately six MHz.[96] Upgraded cable systems – *i.e.*, those that are capable of providing cable Internet service – typically have a bandwidth of between 550 and 750 MHz, approximately ten percent of which is unused.[97]

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[95] *See, e.g.*, 47 U.S.C. § 532(b)(1) ("A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator . . . ."); *see also id.* § 522(4) (a "channel" is "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel"); *see generally Midwest Video*, 440 U.S. 689.

[96] *See* Cable Datacom News, *Overview of Cable Modem Technology and Services*, http://www.cabledatacomnews.com/cmic/cmic1.html ("To deliver data services over a cable network, one television channel (in the 50-750 MHz range) is typically allocated for downstream traffic . . . and another channel (in the 5-42 MHz band) is used to carry upstream signals.").

[97] *McKinsey Broadband Report* at 39 ("approximately 90%" of upgraded cable capacity "is taken up by traditional video services," and cable operators have "tremendous flexibility to reallocate system bandwidth").

Any claim that hybrid fiber-coax is too limited to support unbundling is indefensible, especially when placed side by side with the conclusion that spectrum unbundling makes perfect sense in the much narrower capacity of copper wires. Both Congress and the Commission itself have already devised allocation formulas to address such "too-little-capacity" objections. The formula for commercial leased access, for example, allows competitor access to a percentage of the total activated channels on a cable system.[98] The 1996 Act includes a similar formula for competitor access to capacity on an OVS platform.[99] And there is, indeed, no reason at all that the cable operator itself should retain the right to end up operating *any* of the broadband spectrum on its wires. If a telephone company's customer opts for service from an unaffiliated ISP, the telephone company must surrender to its competitor the *entire* high-speed channel on that customer's line.[100] The FCC could easily fashion rules that allow cable customers a similar selection.

Cable operators may not duck interconnection obligations on the grounds of technical infeasibility, either. Open access poses no risk at all to cable systems, much less the "substantial risk" that Commission precedent establishes as the threshold for avoiding interconnection.[101] That incumbent cable operators already connect with an

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[98] *See* 47 U.S.C. § 532(b)(1) (an operator with between 36 and 54 channels must designate 10 percent of channels not otherwise required for use by law; an operator with between 55 and 100 channels must designate 15 percent of channels not otherwise required for use by law).

[99] If demand for carriage exceeds capacity, the open video system operator may select the programming services to be carried on no more than one-third of the system's activated channel capacity. *See* 47 U.S.C. § 573(b)(1)(B); 47 C.F.R. § 76.1503(c); Second Report and Order, *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223, 18248, ¶ 37 (1996).

[100] *See Line Sharing Order*, 14 FCC Rcd at 20917, ¶ 6.

[101] *See, e.g.*, Decision, *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, 424 (1968); *see also Hush-a-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956) (a customer is free to use communications services in ways which are "privately beneficial without being publicly detrimental").

affiliated ISP, and provide data transmission capacity over hybrid fiber-coax to that ISP, is evidence that transmission capacity can be provided (and spectrum isolated) to unaffiliated providers without adversely affecting traditional cable services.[102] To the extent that allocation of data channels may cause the cable equivalent of intermodulation or guardband distortions, the FCC must require cable operators, as it has done for ILECs in its *Line Sharing Order*, to remedy such problems.[103] Claims of technical infeasibility can be addressed in Commission proceedings or in industry standards bodies, such as NRIC, a federal advisory committee that has been authorized by the Commission under section 256 to recommend standards on spectrum compatibility and spectrum management practices for DSL.[104]

All of the technical infeasibility arguments were made to – and rejected by – the Commission in the context of ILEC spectrum unbundling. The Commission justified imposing spectrum unbundling on the grounds that it would lower entry barriers, increase competition, accelerate the roll-out of broadband services, and prevent ILECs from leveraging their dominant position in the local exchange market into adjacent content markets.[105] These economic rationales must apply with even greater force to a dominant

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[102] *See Line Sharing Order*, 14 FCC Rcd at 20943, ¶ 63 (relying on the fact that ILECs "already provide both analog voice and high-speed data services over one loop by connecting the local loop facility to their DSLAM to utilize the loop's non-voiceband frequency data transmission capability for their own xDSL services").

[103] The FCC has raised the bar even higher: line sharing will not be considered technically infeasible unless the ILEC can demonstrate to the state commission that DSL conditioning "would interfere with the analog voice service of the line." *Id.* at 20952, ¶ 81. Cable, with wires more capacious than the copper pair, must be held to the same standard.

[104] *See id.* at 20992-93, ¶ 184. Pursuant to section 256, the Commission could also establish rules for the equivalent of "loop conditioning" and "performance measurements" on cable networks.

[105] *See Line Sharing Order*, 14 FCC Rcd at 20916, ¶ 5 (lack of access "materially diminishes the ability of competitive LECs to provide certain types of advanced services to residential and small business users, delays broad facilities-based market entry, and materially limits the scope and quality of competitor services offerings"); *id.* at 20930, ¶ 35 ("we find that unbundled access to the high frequency portion of the

competitor than they do to a nondominant one.[106] Cable has more power than an ILEC – not less – to leverage its monopoly power over cable plant into the adjacent ISP market.[107] Cable's protest that regulation will "deter investment" must hold less sway than any ILEC's since cable already dominates this market.[108]

Collocation. The Commission has advanced similar justifications for requiring ILECs to give competitors space to install advanced services equipment – even to the point of requiring telephone companies to permit collocation in "adjacent controlled environmental vaults" on ILEC property if there is not enough space in an ILEC's central office.[109] Requiring cable operators to allow collocation of competitors' broadband equipment in the cable company's head-end offices will – in light of cable's dominant

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loop offers the best opportunity to see these nascent markets evolve into competitive markets"); *UNE Remand Order*, 15 FCC Rcd at 3783, ¶ 190 (without access to DSL-capable loops, ILECs, "rather than the marketplace, would dictate the pace of deployment of advanced services"); *Computer III Further Remand Order*, 14 FCC Rcd at 4295, ¶ 9 ("BOCs remain the dominant providers of local exchange and exchange access services in their in-region states, and thus continue to have the ability to engage in anticompetitive behavior against competitive ISPs.") (footnote omitted).

[106] *Line Sharing Order*, 14 FCC Rcd at 20929, ¶ 32 (noting necessity of considering actual market activity).

[107] Anticompetitive abuses in adjacent content markets led Congress to pass the 1992 Cable Act prohibiting cable operators from leveraging their control over both the conduit and content markets against unaffiliated distributors and programmers. Following antitrust suits filed by the Department of Justice, incumbent cable operators entered consent decrees that required them to unbundle transport and content, with conditions similar to those proposed here. *See United States v. Primestar Partners, L.P.*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); *New York v. Primestar Partners, L.P.*, 1993-2 Trade Cas. (CCH) ¶ 70,403 (S.D.N.Y. 1993).

[108] *UNE Remand Order*, 15 FCC Rcd at 3760, ¶ 139 ("We therefore do not find merit in arguments that the adoption of a list of network elements that must be unbundled nationwide will discourage innovation and investment by incumbent or competitive LECs.").

[109] *See* Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 00-297, ¶ 10 (rel. Aug. 10, 1999) ("The ability of competitive LECs to collocate equipment is particularly important to facilities-based competition for advanced telecommunication services."); *id.* ¶ 17 (collocation rules "reduce barriers to entry and speed the development of competition"); *id.* ¶ 43 (requiring collocation in adjacent controlled environmental vaults when space is otherwise exhausted "ensur[es] that competitive LECs can compete with the incumbent LEC even when no physical collocation space is available within an incumbent LEC structure").

status – do even more to advance competition in the high-speed Internet market than requiring the same of nondominant phone companies.

InterLATA Services Restriction. As noted above, *see supra* p. 22, the Commission is currently weighing whether the Section 271 interLATA prohibition applies to information services, and in particular information services that involve self-provided transport. In our view, and for the reasons given in our comments in that proceeding, the interLATA prohibition does not apply.[110] To the extent, however, that the Commission concludes that the underlying transport is a separate telecommunications service subject to the restriction, considerations of parity and policy require a similar restriction on the providers of cable modem service.

Under such circumstances, local cable operators must be required to sever all connections with providers of backbone Internet services, at least until they have satisfied the Commission that their cable networks have been duly unbundled and interconnected with competitors. The section 271 restriction is premised on the assumption that a dominant player in local markets can gain unfair competitive advantage in long-distance markets.[111] In high-speed Internet markets, cable – not telephone – is the dominant player. AT&T, in particular, has substantial holdings on both sides of the line – and thus an enormous incentive (under this theory) to use its dominance in local high-speed markets to gain an unfair competitive edge in backbone markets. To be sure, forcing a separation of local high-speed markets from long-distance markets might entail some

[110] *See* Comments of SBC Communications Inc., CC Docket No. 96-149 (FCC filed Nov. 29, 2000); Comments of BellSouth Corporation, CC Docket No. 96-149 (FCC filed Nov. 29, 2000).

[111] *See, e.g.*, Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, 20745-46, ¶ 386 (1997).

increase in costs, and reduction in network functionality. But if such a trade-off is appropriate in the case of nondominant ILECs, it is certainly necessary and appropriate for the dominant cable provider.

Resale Obligations. Section 251(c)(4)'s mandatory discount obligations promote "expeditious and efficient" market entry, according to the FCC, because they allow non-facilities-based competitors to provide competing services through resale.[112] The Commission has applied the Act's resale obligations to ILECs' advanced services.[113] Implicit in this holding is the conclusion that facilities-based competition in the last mile for broadband is not sufficiently developed to enable competition without allowing access (at wholesale rates) to the incumbents' advanced services networks.[114] If so, then it is even more imperative that competitors have access to cable broadband networks that are more ubiquitous than DSL networks. And cable operators, with close to 75 percent market share, are far more capable of exercising market power to exact unreasonable resale prices from competitors, than are ILECs, with barely a third as much of the market.

Universal Service. Section 254(d) requires universal service contributions from "[e]very telecommunications carrier that provides interstate telecommunications."[115] As telecommunications carriers providing telecommunications services, cable operators, no less than ILECs, should be subject to universal service contribution obligations.[116]

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[112] *Local Competition Order*, 11 FCC Rcd at 15954, ¶ 907; *see also id.* at 15516-17, ¶ 32, 15935-36, ¶¶ 874-875, 15938-39, ¶ 881.

[113] *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24040, ¶¶ 60-61.

[114] *See Local Competition Order*, 11 FCC Rcd at 15981, ¶ 976 ("Nonincumbent LECs definitionally lack the market power possessed by incumbent LECs and were therefore not made subject to the wholesale pricing obligation in the 1996 Act.") (footnote omitted).

[115] 47 U.S.C. § 254(d).

[116] *See* United States Telecom Association Petition for Declaratory Ruling at 4-10, CC Docket No. 96-45 (FCC filed Sept. 26, 2000).

Advanced Services Affiliates. Finally, in recent ILEC mergers, the Commission exacted the "voluntary" condition of a separate advanced services affiliate because it would "level [the] playing field between [the ILEC] and its advanced services competitors," and "greatly accelerate competition in the advanced services market by lowering the costs and risks of entry and reducing uncertainty, while prodding all carriers, including [the ILECs] to hasten deployment."[117] The same economic logic should require cable – with almost three-quarters of the broadband access market, and tentacles into upstream and downstream markets – to place their advanced services in separate affiliates.

In sum, the procompetitive justifications cited by the Commission in imposing spectrum unbundling, collocation requirements, interLATA restrictions, resale, and separate affiliate obligations on ILECs – that have barely a quarter of the broadband market – require that cable be subject to the same regulatory burdens.

3. Intermediate Title II Regulation: Nondominant Carrier Regulation, the Elimination of UNEs, and Forbearance.

As with the Title I model, the Commission can opt for a middle-ground of less burdensome regulation under Title II. The mere fact that cable modem service and DSL are classified as "telecommunications services" does not mean that the full panoply of restrictions and obligations currently applicable to DSL should be continued (and, hence, extended to cable). Rather, for the same reasons it makes sense to classify all such services as information services subject to Title I – that the services are competitive and

[117] *SBC/Ameritech Order*, 14 FCC Rcd at 14859-60, ¶ 363; *Bell Atlantic/GTE Order* ¶ 261. As previously noted, *see supra* p. 23, the Commission has also hinted that the same requirement may be extended to other carriers through the 271 process.

that there is no underlying bottleneck – it makes sense, even if the underlying transport is a Title II service, to establish a framework that relies primarily on market forces rather than regulatory fiat to promote the public interest.

As part of such a framework, the Commission could declare all broadband Internet providers to be nondominant carriers, subject to minimal tariff and notice requirements under sections 203 and 214. The Commission devised its dominant/nondominant regulatory regime for rate and entry regulation in the 1980s, when it established a "permissive detariffing policy" for nondominant interexchange carriers.[118] The Commission did so in an effort to "pursue[] pro-competitive and deregulatory goals similar to those underlying the 1996 Act."[119] The Commission concluded that "market forces, together with the Section 208 complaint process" (and the authority to re-impose tariff-like requirements) were sufficient "to protect the public interest."[120]

Cable providers, although dominant in the broadband market today, lack the type of market power that the Commission has regarded as precluding nondominant carrier status.[121] Given the nascent nature of the industry, and the fact that competitors – DSL, terrestrial and satellite wireless providers – are fast rolling out alternative services, cable

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[118] *See* Order, *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, 11 FCC Rcd 17963, 17968-70, ¶¶ 19-22 (1996) (describing *Competitive Carrier* cases).

[119] Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 20730, 20735, ¶ 8 (1996) ("*Interexchange Order*").

[120] *Id.* at 20736, ¶ 9. The Commission has extended its nondominant carrier regime to a host of common carriers, including domestic satellite carriers and carriers providing digital transmission services. Fifth Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 98 F.C.C.2d 1191, 1200-02, ¶¶ 12-13, 1205-09, ¶¶ 19-26 (1984).

[121] *See* First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C.2d 1, 21, ¶¶ 57-58 (defining dominant carrier as one that "possesses market power" and noting that control of bottleneck facilities was "prima facie evidence of market power").

does not possess the "control over bottleneck facilities" or ability to sustain unjust and unreasonable prices to warrant dominant carrier regulation.[122]

Of course, if the Commission concludes that cable qualifies for nondominant carrier treatment, ILECs, with perhaps one-third of cable's market share, must be nondominant too. Thus, under Title II's nondominant carrier regulation, *all* broadband providers would be subjected to reduced regulation in the form of streamlined tariff, facilities-authorization and notice requirements.[123]

In addition to treating all broadband providers as nondominant, the Commission could remove many of the current restrictions on ILEC provision of broadband Internet access, thus making it unnecessary to extend such restrictions to cable operators under Title II. For example, as already discussed in the Title I context, the Commission could (and certainly should) remove the high frequency portion of the loop from its list of UNEs that must be provided by incumbent LECs. As discussed above, *see supra* p. 21, the Commission is required to de-UNE-fy elements insofar as competition would not be "impaired" by their disappearance. And with the elimination of mandatory line sharing, loop conditioning, loop qualification, and related collocation mandates would also fall by the wayside, as well as separate affiliate conditions imposed through the merger process. In that case – but only in that case – such restrictions would not need to be extended to cable modem providers, even under a Title II regime. The key principle driving all such

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[122] *Interexchange Order*, 11 FCC Rcd at 20736, ¶ 9 ("The Commission also noted that firms lacking market power could not charge unlawful rates because customers could always turn to competitors.").

[123] The effects of declaring carriers nondominant include: (1) they can file tariffs for new services on one day's notice and tariffs will be presumed lawful; (2) several section 214 requirements are either reduced or eliminated; (3) requests to discontinue or reduce service will be deemed granted after 31 days unless a party or the Commission objects; (4) reduced annual reporting requirements. *See* Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3281, ¶ 12 (1995) ("*AT&T Nondominance Order*").

Commission decisions must be regulatory parity if the Commission is to establish a competitive market structure.

Finally, under section 10, the FCC must forbear from regulations that are (1) unnecessary to ensure just and reasonable practices and (2) unnecessary for the protection of consumers, as long as (3) such forbearance is consistent with the public interest.[124] Forbearance is in the public interest if it "promote[s] competitive market conditions" and "enhance[s] competition among providers of telecommunications services."[125] To make this last determination, the Commission asks whether sufficient competition has emerged in the relevant market to prevent the carrier from exercising market power.[126]

If sufficient competition has emerged so as to prevent cable, the competitor with almost 75 percent market share, from exercising market power, it is inconceivable that any other competitor in that market can exercise market power. Whether the Commission concludes that requiring interconnection will enhance competition among broadband providers, or that the public interest is served by leaving the choice in the hands of the provider, the Commission cannot selectively forbear given cable's dominance. As the FCC has itself recognized, asymmetrical regulation in competitive

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[124] 47 U.S.C. § 160(a). Section 706 of the 1996 Act also authorizes the Commission to forbear from applying regulation to broadband providers. *See id.* § 157 note. But the FCC has ruled that section 706(a) does not constitute an independent grant of forbearance authority, *see Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24044, ¶ 69; accordingly, the forbearance analysis included herein applies equally to the exercise of the FCC's power under section 706.

[125] 47 U.S.C. § 160(b).

[126] *See* First Report and Order, *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, WT Docket No. 98-100, FCC 00-311, ¶ 13 (rel. Sept. 8, 2000) (Commission's forbearance policy is "to deregulate wherever the operation of competitive market forces is capable of rendering regulation unnecessary").

markets is certainly *not* in the public interest because it hinders the competitive process.[127]

Accordingly, even if the FCC concludes that it should exercise its forbearance power to relieve dominant cable operators – in their capacity as telecommunications carriers – of spectrum unbundling, collocation, resale, separate affiliate obligations and the interLATA restriction, it may do so only to the extent that it can also forbear from applying the same regulations to incumbent telephone companies. The Commission may conclude that the requirements of sections 251(c) and 271 have been "fully implemented" with respect to broadband services – because no bottleneck exists with respect to such services. But to the extent that such requirements continue to be imposed on ILEC provision of broadband Internet services, they must also be imposed on the provision of those same services by cable companies.

C. CABLE MODEM SERVICE IS NOT A "CABLE SERVICE."

The final alternative regulatory classification for cable modem services, as a "cable service" under Title VI, is no alternative at all. As an initial matter, section 602 defines "cable service" as the "transmission to subscribers" of video or other programming services.[128] The Commission has long defined "subscriber" in this context to mean "a member of the general public who receives broadcast programming distributed by a cable television system."[129] Since cable modem service is provided

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[127] *See AT&T Nondominance Order*, 11 FCC Rcd at 3290-91, ¶ 32 (lifting tariff notice requirements imposed on AT&T in the long distance market because "AT&T would [otherwise] be subject to excessive regulatory costs and would be hindered in its ability to respond to moves by its competitors").

[128] 47 U.S.C. § 522(6).

[129] 47 C.F.R. § 76.5(ee).

separate and apart from any receipt of broadcast programming, it is not necessarily offered to "subscribers" and therefore cannot fit within the definition of a cable service.

Beyond this, to qualify as a "cable service," Internet access would have to involve "other programming service" – *i.e.*, "information that a cable operator makes available to all subscribers generally."[130] But Internet access involves numerous services that are specifically designed *not* to be "available to all subscribers generally." Email accounts, for example, are typically available to individual users only. Chat-room conversations are likewise designed to wall-off communications from "all subscribers generally."

The legislative history confirms that Internet access does not qualify as "other programming service." The history accompanying the 1984 Act – which included "other programming service" within the term "cable service" – unmistakably carves out information services (and, therefore, Internet access, *see supra* pp. 14-15) from that term.[131] The 1996 Act amended the definition to add the phrase "or use" to the "subscriber interaction" included within the definition of "cable service," but that amendment had no bearing on the relevant phrase "other programming service."[132] As

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[130] 47 U.S.C. § 522(14). "Cable service" is defined in full as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." *Id.* § 522(6). Internet access is clearly not "video programming," which is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." *Id.* § 522(2).

[131] *See* H.R. Rep. No. 98-934, at 42-44 ("services providing subscribers with the capacity to engage in transactions or to *store, transform*, forward, manipulate, *or otherwise process* information or data would not be cable services") (emphasis added); 47 U.S.C. § 153(20) (defining "information service" to include "the offering of a capability for . . . *storing, transforming, [or] processing* . . . information") (emphasis added); *see also* H.R. Rep. No. 98-934, at 44 ("Some examples of *non-cable services* would be: shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission on [sic] non-video data and information not offered to all subscribers . . . .").

[132] *See, e.g.*, 142 Cong. Rec. H1122 (daily ed. Jan. 31, 1996) (statement of Rep. Bliley) (the term "or use" was added to "reflect[] the evolution of video programming toward interactive services"). Nor did the 1996 Act alter the "one-way" limitation in the definition, and Internet access services are clearly two-way services.

the Eleventh Circuit explained, Congress altered the definition of "cable service" merely "to include services that cable television companies offer to their customers to allow them to interact with traditional video programming."[133]

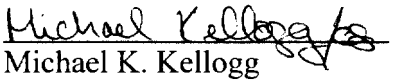
If Internet access provided over cable qualifies as a "cable service," moreover, so too would the exact same service provided by satellite, fixed wireless, DSL, or even over a dial-up connection. All such services would then be removed from Title II regulation and cast into the quagmire of local franchising requirements. That would obviously be a policy disaster and a regulatory nightmare for the Commission.

[133] *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276-77 (11th Cir. 2000) ("we will not read [the addition of 'or use'] to effectuate a major statutory shift . . .").

CONCLUSION

The Commission has repeatedly expressed a preference for market-based regulation of high-speed Internet services. Absent meaningful regulatory relief for all providers of such services, that preference is an empty platitude.

Respectfully submitted,



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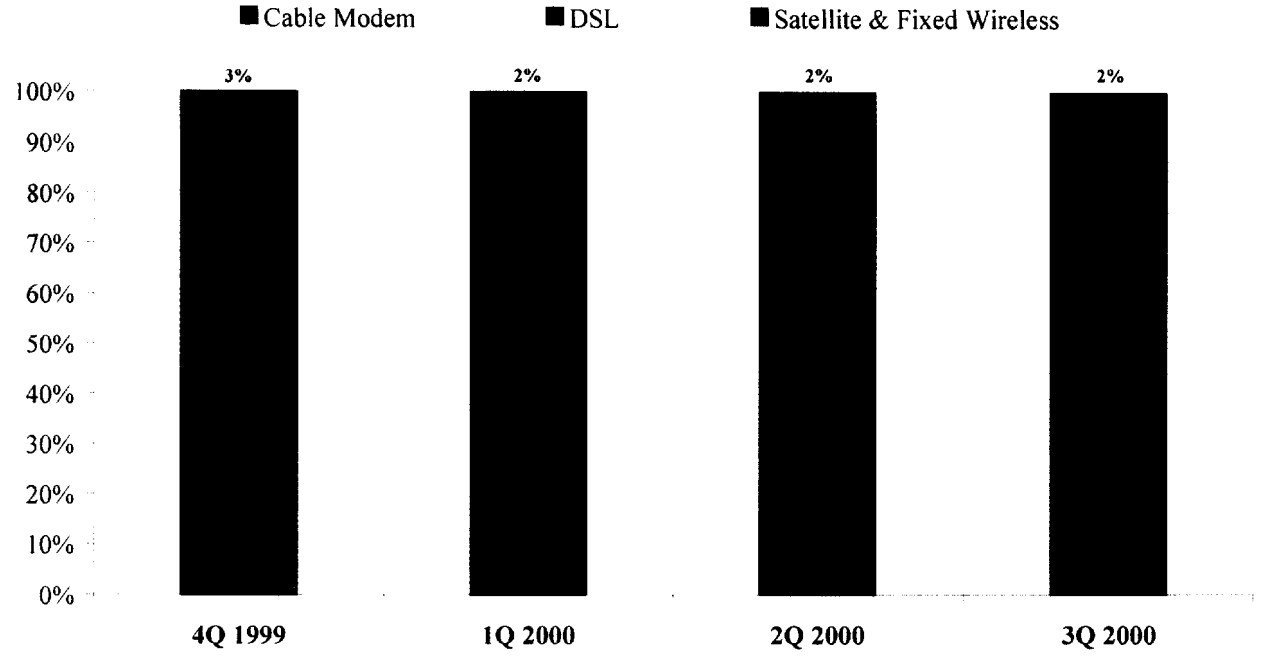
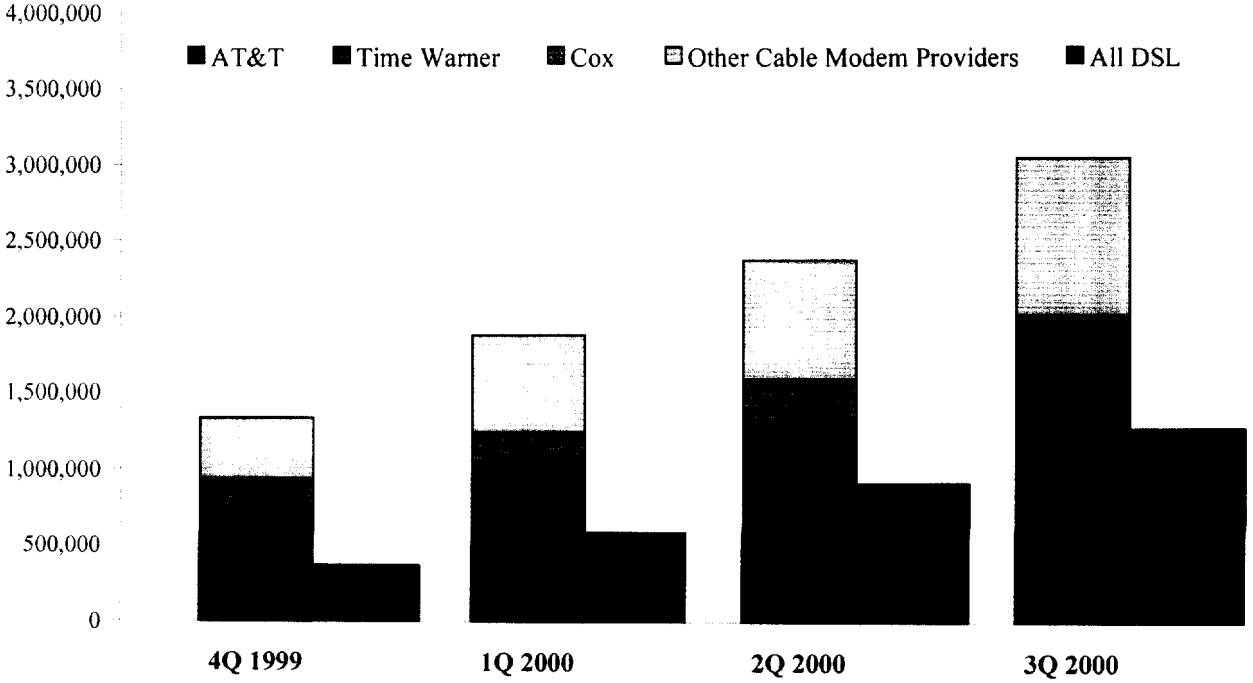
ATTACHMENT A

Residential Broadband Market Division



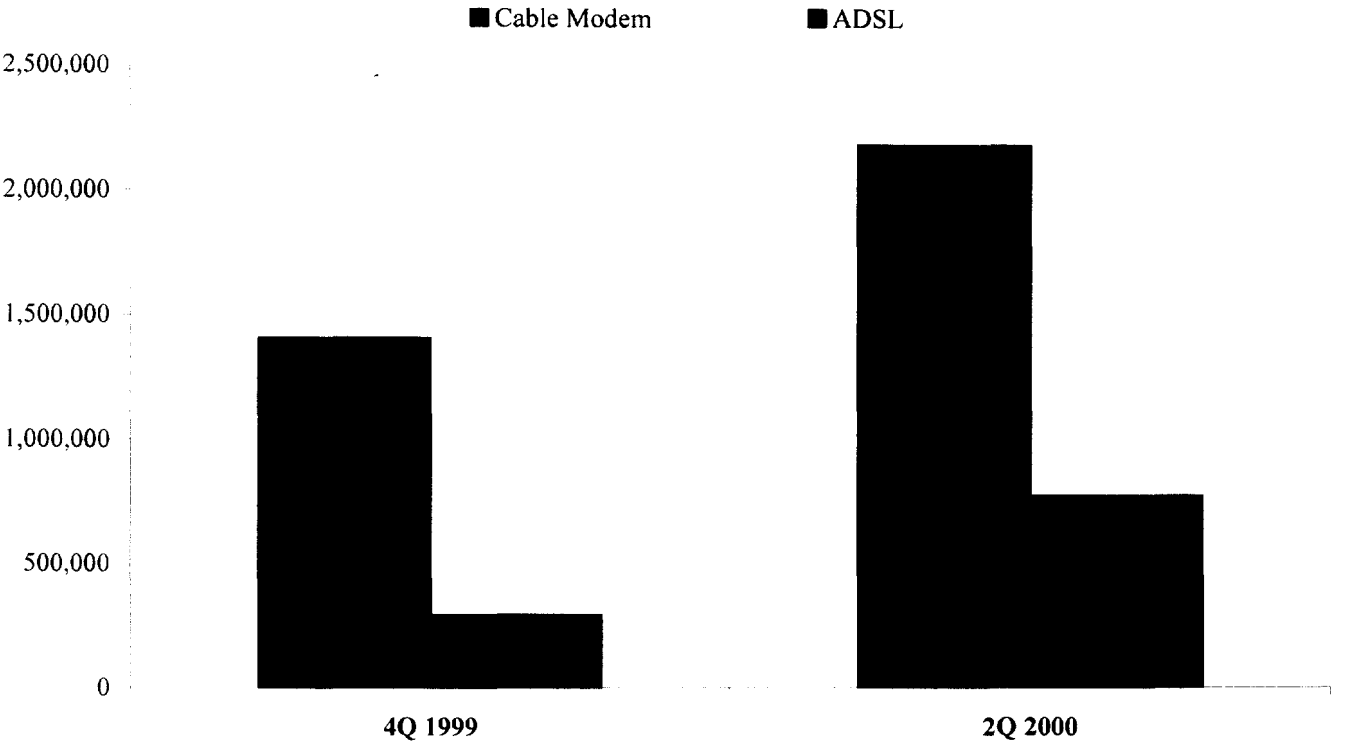
Sources: Cable Datacom News, *Cable Modem Market Stats & Projections*, http://www.cabledatacomnews.com/cmic/cmic16.html (4Q 1999; 1Q 2000; 2Q 2000; 3Q 2000); xDSL.com, *TeleChoice DSL Deployment Summary*, http://www.xdsl.com/content/resources/deployment_info.asp (4Q 1999; 1Q 2000; 2Q 2000; 3Q 2000); FCC, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000* (rel. Oct. 2000).

Residential Broadband Subscribers



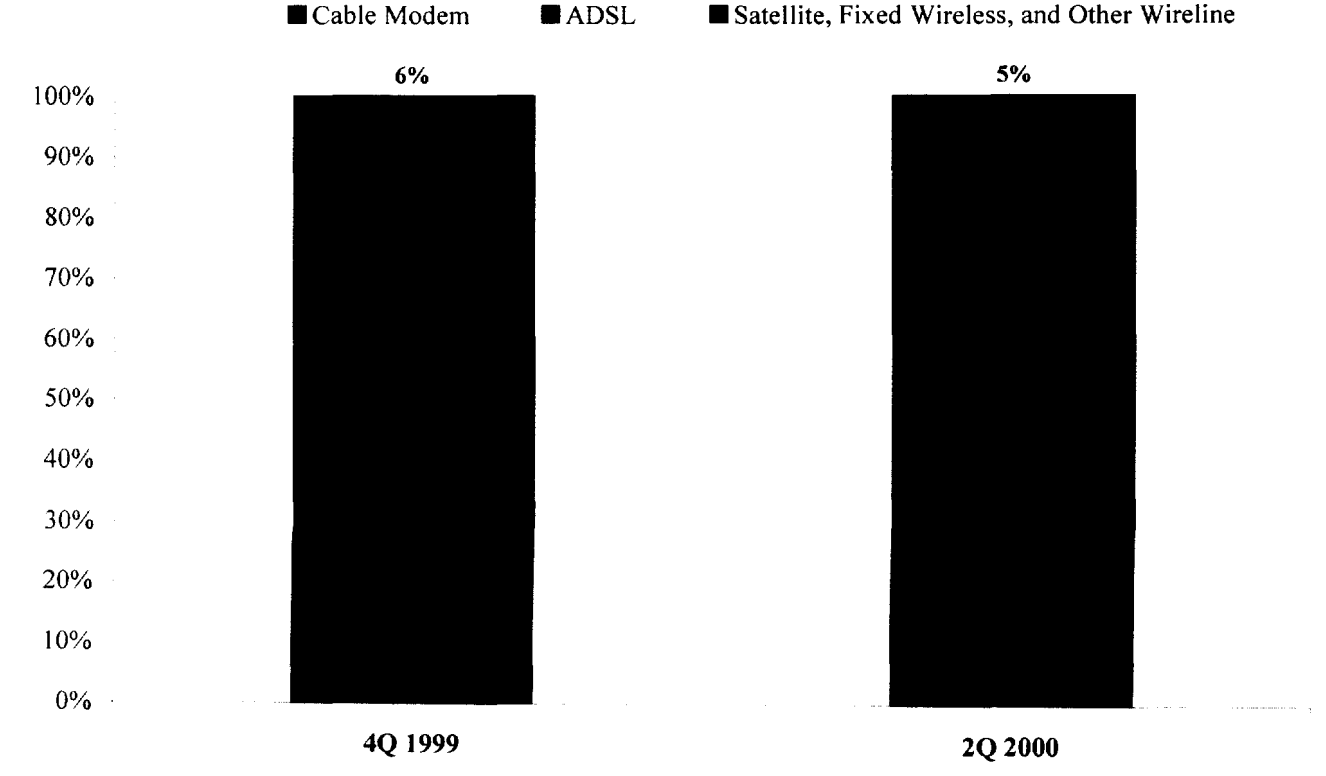
Sources: Cable Datacom News, *Cable Modem Market Stats & Projections*, http://www.cabledatacomnews.com/cmic/cmic16.html (4Q 1999; 1Q 2000; 2Q 2000; 3Q 2000); xDSL.com, *TeleChoice DSL Deployment Summary* http://www.xdsl.com/content/resources/deployment_info.asp (4Q 1999; 1Q 2000; 2Q 2000; 3Q 2000); FCC, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000* (rel. Oct. 2000).

Residential & Small Business High-Speed Subscribers



Source: FCC, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000* (rel. Oct. 2000).

Residential & Small Business High-Speed Market Division



Source: FCC, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000* (rel. Oct. 2000).

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2000, I caused copies of the foregoing *Comments of SBC Communications Inc. and BellSouth Corporation* to be served by hand delivery upon the following parties:

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